

Fair Political Practices Commission

MEMORANDUM

TO: Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson

FROM: Steven Benito Russo, Chief of Enforcement
Alan Herndon, Chief Investigator
Jon Wroten, Investigator

DATE: July 20, 2001

SUBJECT: Consideration of Revisions To the Major Donor Program Penalty Structure

Introduction

At the June 8, 2001 Commission meeting, the Commission asked that the Enforcement Division bring up for review the schedule of standardized penalties that are to be imposed for major donor violations under the Commission's "streamlined" major donor enforcement program. The impetus for this review was two-fold. First, it has been nearly a year since the penalty schedule was last reviewed. Second, some of the Commissioners, although certainly not all, have expressed a view that the scheduled penalties may be too low, particularly for Tier 1 and Tier 2 violators who contribute an unusually large amount of money, or make an unusually large number of contributions.

The Enforcement Division is therefore presenting to the Commission three decision points regarding the penalty structure for the Major Donor Program. Each of these decision points presumes that the Commission is generally satisfied with the overall structure of the Major Donor Program, as adopted by the Commission at its December 2000 meeting, particularly the way that the program imposes a greater or lesser penalty on a violator, based upon how quickly the violator comes into compliance with the law after being contacted by the Enforcement Division. Accordingly, the decision points in this memorandum are focused on whether the scheduled penalties should remain the same, or be modified in one manner or another, to impose higher penalties on some or all violators. Obviously, if the Commission has broader concerns about the Major Donor Program than were contemplated in the drafting of this memorandum, the Enforcement Division stands ready to address those concerns as directed.

In this memorandum, the decision points for consideration by the Commission are: (1) whether the amount of the scheduled penalties should be increased in some "across the board" fashion; (2) whether the amount of the penalties should be enhanced for certain kinds of

violators; and (3) what criteria, if any, should be used for excluding certain violators from the

program.

Decision I: The Basic Penalty

Under this decision point, the Enforcement Division is presenting three options for the Commission to consider. Retained in each option is the “tier” concept, that requires the amount of the penalty to increase with the amount of effort required by the Enforcement Division to induce the violator to comply with the law. Each of the options is set forth in the chart that is included as an attachment to this memorandum. Described simply, the three options are as follows:

Option 1: Maintain the current basic penalty schedule without any increase.

Option 2: Institute a moderate increase in the basic penalty schedule for both Tier 1 and Tier 2 violators, with a larger increase for Tier 2 violators than for Tier 1 violators.

Option 3: Institute a major increase in the basic penalty schedule for Tier 1 and Tier 2 violators, in a manner that is proportional to Proposition 34’s increase in the maximum penalty that may be imposed for a violation of the Act, from \$2,000 to \$5,000. This translates into a 150% increase in penalties for Tier 1 and Tier 2 violators, but keeps their penalty amounts at 20% and 30%, respectively, of the statutory maximum per violation. This option would also set the minimum penalty for Tier 3 violators at \$2,000, in order to assure that each successive Tier corresponds with a successively higher penalty.

In considering Option 1, the Commission may wish to take into account two considerations. The first consideration is whether the current penalty schedule has shown itself to be effective in obtaining compliance with major donor filing requirements. The second consideration is whether the penalties imposed under the current schedule seem to be appropriate for the conduct of the violators on which the penalties are imposed, or whether some higher penalty would be more appropriate.

If the Commission feels, after considering Option 1, that somewhat higher penalties should be imposed, Option 2 provides a method for increasing penalties across the board for Tier 1 and Tier 2 violators, while still encouraging prompt compliance with the law upon first being contacted by the Enforcement Division. To do this, Option 2 increases the penalty for Tier 1 violators (who file their delinquent major donor statement upon the Enforcement Division’s initial written contact) by \$100, and increases the penalty for Tier 2 violators (who file their delinquent major donor statement upon the Enforcement Division’s second written contact) by \$400. Tier 3 violators (who require more than two contacts from the Enforcement Division before they file their delinquent major donor statement) would not be affected by this option because under the current penalty schedule they are already being assessed a penalty of 15% of their unreported contributions, and therefore a minimum of \$1,500.

If, after considering Option 1, the Commission feels that substantially higher penalties are

called for, Option 3 provides a method for doing this by increasing the penalties for Tier 1 and Tier 2 violators by 150%, to \$1,000 and \$1,500 respectively, and setting the minimum penalty for Tier 3 violators at \$2,000. As the Commission has not historically viewed major donor violations as being among the most serious violations of the Political Reform Act, if the Commission were to adopt this option for substantially higher penalties, it would constitute a significant policy shift for the Commission. Adoption of this option could also result in fewer violators agreeing to stipulate to their violations as part of the Major Donor Program, as they may find it worthwhile to contest such higher penalties at a hearing.

Of the three options being presented to the Commission, **Enforcement Division staff recommends Option 2.** This option provides for a moderate increase in penalties that is justifiable for persons who now violate major donor filing requirements after over two years of the Commission's vigorous enforcement of those requirements, while not imposing penalties that are so severe as to dissuade violators from participating in the streamlined Major Donor Program.

Decision 2: Penalty Enhancement

This decision point allows the Commission to consider whether, in addition to the basic scheduled penalty discussed above, that is based on how quickly a violator complies with the law after being contacted by the Enforcement Division, it also wants to impose a penalty based upon the amount or number of contributions the violator did not report. To facilitate consideration of this issue, the Enforcement Division again presents three options, set forth in the chart that is included as an attachment to this memorandum. Described simply, the three options are as follows:

Option 1: Impose no additional penalty based on the amount or number of contributions the violator did not report.

Option 2: Impose, in addition to the basic penalty, an additional penalty equal to 1% of the total contributions not reported by the violator, if the violator either: (1) failed to report \$50,000 or more during the semi-annual period that is the subject of the violation, or (2) failed to report ten or more contributions during that period.

Option 3: Impose upon all violators, in addition to the basic penalty, an additional penalty equal to 1% of the total contributions not reported by the violator, regardless of the amount or number of unreported contributions.

Just as when it considered Option 1 for Decision 1, when considering Option 1 for Decision 2, the Commission may wish to take into account two considerations. The first consideration is whether the current penalty schedule has shown itself to be effective in obtaining compliance with major donor filing requirements. The second consideration is whether the penalties imposed under the current schedule seem to be appropriate for the conduct of the violators on which the penalties are imposed, or whether some higher penalty would be more

appropriate.

If the Commission feels that the penalty imposed upon a violator should be tied to the level of a violator's campaign activity, in addition to how quickly the violator complies with the law after being contacted by the Enforcement Division, then Options 2 and 3 offer alternative methods for doing that.

Singling out only the most "significant" major donors, Option 2 provides for an additional penalty of 1% of total unreported contributions only for those violators who fail to report \$50,000 or more in contributions during the semi-annual period that is the subject of the violation, or fail to report ten or more contributions during that period. This means, for example, that a major donor violator who failed to report \$50,000 in contributions would be required to pay a penalty of \$500 in addition to whatever scheduled penalty the violator is required to pay as a result of being in either Tier 1, 2, or 3.

Option 3 is the same as Option 2, except that this option would apply the 1% enhancement to all violators. In this way, all penalties under the Major Donor Program, and not just the penalties imposed on the "most significant" major donor violators, would be tied to the amount of unreported contributions.

Of the three options being presented to the Commission under this decision point, **Enforcement Division staff recommends the adoption of Option 2.** This option allows the Commission to retain relatively low, standard penalties for most violators, which according to our most recent review of the Major Donor Program appear to be operating effectively, while also imposing progressively higher penalties on those violators who engage in the most significant campaign activity.

Decision 3: Criteria For Exclusion from the Streamlined Major Donor Program

Throughout the history of the Major Donor Program, the Enforcement Division has retained prosecutorial discretion to exclude from the program any case that Enforcement Division staff feels is inappropriate for handling under the streamlined program due to the particular circumstances of the case. Major donor cases excluded from the program are investigated in the same manner as other cases not included in an expedited program, and resolved without regard to the standardized schedule of penalties adopted for the Major Donor Program.

Within that broad grant of prosecutorial discretion, the Commission has previously directed Enforcement Division staff to specifically examine any case in which a major donor violator has made \$50,000 or more in unreported contributions, to determine whether it is appropriate to process that case through the streamlined program. In response to that direction, the Enforcement Division has instituted a procedure of evaluating each such case before processing it under the program, and routinely excludes such cases from the program unless the Chief of Enforcement determines that under the specific facts of the case it is appropriate to

include the case in the program.

Under this decision point, the Enforcement Division is asking the Commission to reaffirm its previous grant of prosecutorial discretion to exclude certain cases from the expedited program, where, in the judgment of Enforcement Division staff, including a case in the program would be inappropriate. Along with asking for that reaffirmation of discretion to exclude cases from the program, the Enforcement Division is asking the Commission to adopt a *non-exhaustive* list of criteria that may be used by the Chief of Enforcement to exclude cases from the program, when the overall circumstances of the case warrant its exclusion. Staff is proposing the following as that list of criteria that may be used as a basis for excluding cases from the streamlined Major Donor Program:

1. The violator is currently being investigated or prosecuted for one or more other violations of the Political Reform Act;
2. The violator has previously been prosecuted for one or more other violations of the Political Reform Act;
3. The violator's filing history, and/or other factors, indicate that the violator intentionally committed the violation to conceal political activity;
4. The violator declines to participate in the Major Donor Program; or
5. The overall circumstances of the case are such that application of the Major Donor Program's standardized penalty schedule to the particular case would result in an injustice.

Staff contemplates that even if a case is found to warrant exclusion from the Major Donor Program, the case may, where appropriate, still be processed using the streamlined Stipulation, Decision, and Order approved by the Commission for use in the streamlined program, but with a different penalty than that which is specified in the standardized penalty schedule for the program. For example, a case involving a Tier 1 major donor violator with a recent prior violation could be processed using the streamlined Stipulation, Decision, and Order, but with a higher penalty, such as a penalty that is equal to that of a Tier 2 violator. A case involving a Tier 2 major donor violator with a recent prior violation could be processed using the streamlined Stipulation, Decision, and Order, but with a penalty equal to that of a Tier 3 violator. Finally, a case involving a Tier 3 major donor violator with a recent prior violation could be processed using the streamlined Stipulation, Decision, and Order, but with a penalty equal to 25% of the violator's unreported contributions, a penalty which was approved by the Commission at its May 2000 meeting. Obviously, the special nature of these stipulations would be noted for the Commission when the Enforcement Division seeks to obtain their approval.

The Enforcement Division recommends that the Commission reaffirm its previous grant of discretion to the Enforcement Division to exclude cases from the streamlined program, and adopt the above list of criteria for excluding cases from the program.